Wong Sze Soon v Pegawai Pemegang Harta Malaysia & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 21–99–94
JAMES FOONG J
17 JULY 1995

Land Law *— Restraint on dealings — Caveats — Application for removal of — Whether applicant has locus standi — Whether purchaser at auction an aggrieved party if purchase price not paid in full — Whether onus of proof on caveator or caveatee — National Land Code 1965 s 327(1)*

Civil Procedure *— Trial — Right to begin — Application for removal of caveat — Whether caveator must begin — Whether caveatee must begin if not registered owner — National Land Code 1965 s 327(1)*

The plaintiff applied to set aside two caveats lodged against a piece of land ('the land') in respect of which the plaintiff was the successful bidder at a public auction pursuant to foreclosure proceedings. The first caveat was a registrar's caveat entered by the first defendants on the ground that the registered owner of the land was an adjudicated bankrupt. The second was a private caveat entered by the second defendant based on a sale and purchase agreement for the sale of the land to the second defendant by the registered owner. The plaintiff paid 10% of the purchase price on 22 September 1994 to the land administrator with the balance of 90% to be paid within three months. The plaintiff obtained a loan from a financial institution, but it could not be disbursed due to the two caveats. However, he obtained a three-month extension of time to pay the balance of the purchase price and applied to remove the caveats. The first defendants merely raised token objections whereas the second defendant contended that as the beneficial owner, he had a caveatable interest over the land. The second defendant claimed that as he had made significant payments towards the purchase price, his claim raised serious questions to be tried and on the balance of convenience, his private caveat ought to remain. The second defendant also alleged that: (i) the plaintiff had no locus standi since he could not be considered as an 'aggrieved party' as he had not paid the full balance of the purchase price within the time stipulated in the terms and conditions of the sale by public auction; and (ii) the land administrator had no authority to grant any extension of time, but even if he had, such extended period had lapsed with no payment having been made by the plaintiff.

Held, dismissing the application:

(1) The onus of proof placed upon the caveator to begin the case by showing that he has a caveatable interest applies only where the caveatee is the registered owner of the land. If the caveatee is not

the registered owner, he has no registered title to rely on as prima facie evidence of his interest in the land and he must begin by satisfying the court that there are sufficient grounds in fact and law as would make him aggrieved by the existence of the caveat. Therefore, the plaintiff had first to prove that he was an 'aggrieved person' as required by s 327(1) of the National Land Code 1965 ('the Code'). A B

(2) When the functions of the land administrator are similar to that of the High Court, eg in carrying out a judicial sale by public auction under the Code, the land administrator has the same rights as the High Court to vary the terms and conditions of the sale, provided that there is regard to the interests of the chargor and chargee and that it is fair to do so. There was no evidence to show that the land administrator had disregarded the interests of the chargor and chargee in granting the extension of time to pay the balance purchase price or that it was unfair of him to do so. Therefore, the extension was legal and valid. C D

(3) As the plaintiff had failed to pay the balance purchase price within the extended period, the contract secured by the plaintiff under the public auction had lapsed and became null and void. Therefore, the plaintiff had no legal claim over the land and could not qualify as an 'aggrieved party' within s 327(1) of the Code. Without such qualification, he had no locus standi in these proceedings. E

[Bahasa Malaysia summary

Plaintif telah memohon untuk mengenepikan dua kaveat yang dimasukkan ke atas sebidang tanah ('tanah tersebut') untuk mana plaintif merupakan pembuat tawaran yang berjaya di suatu lelong awam berkaitan dengan prosiding perampasan. Kaveat pertama adalah suatu kaveat pendaftar yang dimasukkan oleh defendan pertama atas dasar bahawa pemilik berdaftar tanah tersebut adalah seorang bankrap. Kaveat kedua adalah kaveat persendirian yang dimasukkan oleh defendan kedua berdasarkan suatu perjanjian jual beli untuk penjualan tanah tersebut kepada defendan kedua oleh pemilik berdaftar. Plaintif telah membayar 10% dari harga belian pada 22 September 1994 kepada pentadbir tanah dengan bakinya yang 90% itu untuk dibayar dalam masa tiga bulan. Plaintif telah mendapatkan suatu pinjaman daripada suatu institusi kewangan, tetapi pinjaman itu tidak boleh dibayar kerana kewujudan dua kaveat itu. Bagaimanapun, beliau telah mendapatkan suatu perlanjutan masa selama tiga bulan untuk membayar baki harga belian itu dan telah memohon untuk membatalkan kaveat itu. Defendan pertama hanya membangkitkan sedikit bantahan tetapi defendan kedua menegaskan bahawa sebagai pemunya benefisial, beliau mempunyai kepentingan boleh kaveat atas tanah tersebut. Defendan kedua mengata bahawa oleh kerana beliau telah membuat bayaran yang ketara terhadap pembayaran F G H I

harga belian, tuntutannya membangkitkan soalan yang serius untuk dibicarakan, dan atas imbangan kemudahan, kaveat persendiriannya patut dikekalkan. Defendan kedua juga mengatakan bahawa: (i) plaintif tiada locus standi kerana beliau tidak boleh dianggap sebagai suatu 'pihak terkilan' kerana beliau tidak membayar baki penuh harga belian dalam masa yang ditentukan di dalam syarat dan terma lelongan awam itu; dan (ii) pentadbir tanah tidak mempunyai kuasa untuk memberikan sebarang perlanjutan masa, dan meskipun beliau mempunyai kuasa sedemikian, tempoh yang dilanjutkan itu telahpun luput tanpa sebarang bayaran dibuat oleh plaintif.

Diputuskan, mengenepikan permohonan itu:

(1) Beban membukti yang terletak atas pengkaveat untuk memulakan kesnya dengan menunjukkan bahawa beliau mempunyai suatu kepentingan boleh kaveat terpakai hanya di mana penanggung kaveat itu merupakan pemunya berdaftar tanah itu. Jika penanggung kaveat itu bukan pemunya berdaftar, beliau tidak boleh bergantung pada hakmilik berdaftarnya sebagai bukti prima facie tentang kepentingannya di dalam tanah itu dan beliau mesti bermula dengan memuaskan hati mahkamah bahawa terdapat alasan yang mencukupi pada hakikatnya dan di sisi undang-undang yang akan membuat beliau terkilan oleh kewujudan kaveat itu. Oleh yang demikian, plaintif terlebih dahulu mesti membuktikan bahawa beliau adalah 'seorang terkilan' seperti yang diperlukan oleh s 327(1) Kanun Tanah Negara 1965 ('Kanun itu').

(2) Apabila fungsi pentadbir tanah sama seperti Mahkamah Tinggi, misalnya apabila menjalankan suatu jualan kehakiman melalui lelongan awam di bawah Kanun itu, pentadbir tanah mempunyai hak yang sama seperti Mahkamah Tinggi untuk mengubah terma dan syarat jualan itu, dengan syarat bahawa pertimbangan diberikan kepada kepentingan penggadai dan pemegang gadaian dan ianya adil untuk berbuat demikian. Tidak terdapat apa-apa keterangan untuk menunjukkan bahawa pentadbir tanah telah tidak mengendahkan kepentingan penggadai dan pemegang gadaian apabila memberikan perlanjutan masa untuk membayar baki harga belian atau bahawa ianya tidak adil untuk beliau berbuat demikian. Oleh itu, perlanjutan masa itu adalah menurut undang-undang dan sah.

(3) Oleh kerana plaintif telah gagal membayar baki harga belian dalam tempoh yang diperlanjutkan itu, kontrak yang diikat oleh plaintif di bawah lelongan awam itu telah luput, dan menjadi batal dan tidak sah. Oleh itu, plaintif tidak mempunyai apa-apa tuntutan di sisi undang-undang ke atas tanah tersebut dan tidak berkelayakan sebagai 'pihak terkilan' mengikut s 327(1) Kanun itu.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed) paras 1687–1775; [1989] Mallal's Digest 1084–1089, 1090, 1132–1134; [1990] Mallal's Digest 837–845, 883, 897; [1991] Mallal's Digest 1318–1328, 1389; [1992] Mallal's Digest 1260; [1993] Mallal's Digest 970–980.

For a case on the right to begin, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3621.

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (folld)

Ismaga Bina Sdn Bhd v Govindasamy [1994] 1 MLJ 221 (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (folld)

Malayan United Finance Bhd v Tay Lay Soon [1991] 1 MLJ 504 (refd)

Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors [1994] 1 MLJ 136 (refd)

United Malayan Banking Corp Bhd v Development & Commercial Bank Ltd Bhd [1983] 1 MLJ 165 (refd)

Legislation referred to

National Land Code 1965 ss 326, 327

Blanche O'Leary (*Blanche Kayveas & Co*) for the plaintiff.
AV Nadeson (Jabatan Pemegang Harta Malaysia) for the first defendant.
Rajeswary J Muniandy (*M Rajes & Associates*) for the second defendant.

James Foong J: The plaintiff in this case is applying to set aside two caveats lodged against a piece of property held under HS(M) 4839 for Lot 11337 Mukim of Empang, Daerah Ulu Langat, Selangor (hereinafter referred to as 'the said land'). The first caveat is a registrar's caveat placed on the said land at the request of the first defendants on the ground that the registered owner of the said land ('the registered owner') is an adjudicated bankrupt. The second caveat placed by the second defendant is a private caveat based on the reason that the registered owner has entered into a sale and purchace agreement with the second defendant for the sale of the said land to the second defendant.

The plaintiff, on the other hand, is a successful bidder in a public auction conducted by the land administrator pursuant to foreclosure proceedings instituted by the chargee of the said land — Standard Chartered Bank Malaysia Bhd ('the bank'). The plaintiff had paid a sum equivalent to 10% of the purchase price on 22 September 1994 to the land administrator with the balance of 90% to be paid within three months from that date. In order to finance this purchase, the plaintiff was able to secure a loan from a financial institution, but this loan cannot be disbursed unless the said land can be transferred and registered in the name of the

A plaintiff and thereafter charged to the financial institution. This obviously cannot be achieved in view of the presence of the two caveats on the said land. Henceforth, the plaintiff applied to remove them.

The first defendants raised token objection but are more interested in any balance money remaining over after payment to the bank for their B necessary action. The Official Assignee (the first defendants) informed this court that since the registered owner was declared a bankrupt he has not made any attempts to communicate with the Official Assignee's office despite the fact that it is mandatory to do so.

The second defendant, however, has filed an affidavit objecting to C this plaintiff's application. He explained that he is a beneficial owner of the said property under a written sale and purchase agreement he entered into with the registered owner on 22 August 1984, and under the terms of this agreement he is allowed to pay the balance of the purchase price by instalment which was duly performed with him paying directly to the bank for and on behalf of the registered owner. According to him, this instalment D payment was stopped when the registered owner was adjudicated a bankrupt. He has written to the Official Assignee but received no reply, and at the present moment he is awaiting further developments. He contended that being a beneficial owner he has a caveatable interest over the said land and, based on the fact that he has made significant payments towards the purchase price, his claim does raise serious questions to be E tried and on the balance of convenience his private caveat ought to remain.

One other interesting contention of the second defendant, is the allegation of the plaintiff having no locus standi in this application since he cannot be considered as an 'aggrieved party' for reason that the plaintiff himself has also not paid the full balance of the purchase price to the land F administrator within the time stipulated in the terms and conditions of the public auction.

The plaintiff, however, argued that he has obtained an extension of time to pay the balance of the purchase price from the land administrator. To this, he annexed to his affidavit in reply, a letter dated 14 December G 1994 addressed to him by the land administrator, Ulu Langat District (the authority who conduct the sale by public auction), granting him an extension of three months to pay the balance of the purchase price.

The plaintiff then proceeded to highlight to this court that up to the date of the hearing of this application, the second defendant has not filed H any application to the honourable court to establish his right by way of specific performance or otherwise. This period of delay must be considered from the time when the registered owner was made a bankrupt (17 November 1986), for it was during this period the second defendant maintained that he stopped making instalment payments towards the purchase price. It was contended that an examination of the sale and I purchase agreement between the second defendant and the registered owner revealed, first, no specific date was fixed for completion of this sale and secondly, the second defendant was supposed to have continued to pay the balance of the purchase price by way of similar instalment amounts

towards the repayment sum required of the bank on the registered owner. Since such payment was discontinued, the sale and purchase between the second defendant and the registered owner would have terminated, and the second defendant's rights and interest to the said land ceased, particularly when the said land was subsequently auctioned. The case of *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 was cited in support of this proposition.

It is often a common process in an application for the setting aside of a caveat to require the caveator to prove initially, that he has a caveatable interest over the land in question, followed by the satisfaction of a serious question to be tried, and that on the balance of convenience the private caveat ought to remain. This must be the correct approach if one is to concentrate only on a portion of the judgment of Lord Diplock in the classic case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 where it states as follows (at p 215B):

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

However, this onus of proof placed upon the caveator to begin should only apply in cases where the 'caveatee' (a person affected by the caveat) is the registered owner of the land. If he is otherwise, then, Lord Diplock in *Eng Mee Yong*'s case has this to reveal (at p 215C):

> In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (ie the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case, the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s 327 are caveatee and caveator there is no difference between what a caveator must establish to obtain an extension of the caveat under s 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s 327.
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> It is otherwise when the applicant under s 327 is someone other than the caveatee. He has no registered title to rely upon as prima facie evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

Therefore, when a caveatee is not the registered owner, it is for him to begin with proof to the satisfaction of the court that he is an 'aggrieved person' as required by s 327(1) of the National Land Code 1965 ('the Code'). This, he must do so by tendering sufficient evidence to justify that

A he has an interest that can be sustained by the law and fact over the land. The caveator need not begin to prove his case until this condition is fulfilled by the caveatee. This approach seems to have been adopted in the following cases: *United Malayan Banking Corp Bhd v Development & Commercial Bank Ltd Bhd* [1983] 1 MLJ 165, where the caveatee were the registered chargees; *Ismaga Bina Sdn Bhd v Govindasamy* [1994] 1 MLJ
B 221, where the caveatee was a registered leasee; and *Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 MLJ 136 where the caveatees were successful bidders who completed payment of the full purchase price at an auction; all of whom were at the material time not registered proprietors of the land.

C Learned counsel for the second defendant chose to rely on the phase 'no locus standi' to describe the position of the applicant in this case. Selventhiranathan JC (as he then was), in *Ismaga Bina Sdn Bhd*'s also adopted this cliche when he elaborated ([1994] 1 MLJ 221 at p 232C):

> D ... before [the applicant] could proceed to [prove that the respondent was not within the category of persons or bodies specified in s 323(1) of the Code], the applicant had to show that it had the necessary locus standi to make the application for the removal of the caveat by virtue of being a person or body aggrieved by the existence of the caveat.

In the opinion of this court, this indeed is an appropriate term.
E Section 327(1) of the Code, imposes a condition that only an 'aggrieved person' can apply for the removal of a caveat under this provision and non-fulfilment of this condition deprives the applicant of any standing before the court in such an application.

The principles to determine who an 'aggrieved person' is has already
F been expounded in the judgment of Lord Diplock in *Eng Mee Yong* and if the applicant fails to satisfy such established principles, he has no locus standi before the court.

In this present case, the plaintiff was a successful bidder in a public auction which was conducted under the terms and conditions as advertised for the auction. One such condition was that the balance of the purchase
G price must be paid within 90 days from the date of sale, and failure to do so would make the 10% deposit so paid by the plaintiff to the land administrator liable to be forfeited. From the evidence tendered, the 90 days expired on 22 September 1994 and it is not denied by the plaintiff that this balance of the purchase price was not paid. However, he submitted
H that he was granted an extension of three months to pay the balance of the purchase price by the land administrator. To this, the second defendant's counsel put forth two arguments. The first is that the land administrator has no authority to grant any extension of time to any successful bidder to pay the balance of the purchase price after the sale is completed by public auction. The second is that even if the land administrator can grant such
I an extension of time, such extended time has lapsed with the plaintiff making no such payment of the balance of the purchase price to date.

In respect of the first contention raised by the second defendant, this court finds no merits therein in the light of the Supreme Court's decision

in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, where it conferred upon the High Court a right to vary the terms and conditions of a sale completed by public auction, 'if having regard to the interest of both the chargor and the chargee, it is fair to do so' (per Wan Yahya SCJ at p 309C). *M & J Frozen Food*'s case was decided based on a judicial sale in consequence to foreclosure proceedings brought by the chargor, and as the result of which the High Court carried out a sale by public auction. In the present case before this court, the land administrator not unlike the High Court in *M & J Frozen Food*'s case, also performed similar functions in carrying out a judicial sale by public auction as provided for by the Code. When the functions of the land administrator are similar to that of the High Court in such matters, this court is of the opinion that the land administrator has the same right as those of the High Court to vary the terms and conditions of the sale completed by public auction, of course provided always that there is regard to the interests of the chargor and chargee, and that it is fair to do so. In this case, the land administrator has granted an extension of time to pay the balance of the purchase price, which is a variation of the terms and conditions of sale. As he has the legal right to do so, and in the absence of any evidence that he has not regarded the interest of both the chargor and chargee of the said land and that it was unfair of him to do so, this court finds that the extension of time to pay the balance of the purchase price so granted by him is legal and valid.

As regards the second contention of the second defendant, this calls for a careful perusal of the letter of extension issued by the land administrator. This letter is dated 14 December 1994. The date for payment of the balance of the purchase price under the original terms and conditions of the auction sale was 22 September 1994. With this letter from the land administrator, the period for payment would have been extended to 22 December 1994. Regrettably, no payment was made on or before this date by the plaintiff. Any proposition that the extended date should commence from the date of the land administrator's letter is totally unacceptable for any extension of time must always commence from the original stipulated period (unless stated otherwise). Without such payment, the contract secured by the plaintiff under the public auction lapsed, and thus became null and void with the 10% paid earlier liable to be forfeited. This must be so, for it is a term and condition expressly stated in the condition of sale published and accepted by the plaintiff before the public auction was concluded. There is no stipulation in the conditions of sale that the balance of the purchase price need only be paid upon the removal of any caveats. In fact, the existence of the two caveats lodged by the defendants were clearly displayed in the conditions of sale and that the sale of the said land was subject to their existence. As the plaintiff had full knowledge of such a fact and accepted the same as binding upon him, he cannot now turn back with excuses that their existences prevented him from completing the purchase. The land administrator under the Code need not be concerned with how a successful bidder proposes to raise his finance to pay for his purchase. Such a matter must surely be the sole

responsibility of the plaintiff and if his financer seeks to impose conditions before the release of any loan amount, the same cannot and should not be simultaneously forced upon the legal authority selling the said land through prior agreed terms.

With the purchase of the plaintiff for the said land terminated, the plaintiff no longer has any legal claim over the same, and as such, he cannot qualify as an 'aggrieved party' within s 327(1) of the Code. Without such qualification, he has no locus standi in these proceedings. Accordingly, this court dismisses this plaintiff's application with cost without even the necessity of proceeding to consider the merits of whether the caveats should be removed. As correctly pointed out by Teo Keang Sood in an article titled 'Removal of Private Caveats by the Court' [1994] 3 MLJ lxxxv at p xci:

> Where such an applicant fails to so satisfy the court, the caveat entered by the caveator will remain. In such a case, the caveator need not even have to discharge the onus which would otherwise have been placed on him.

Application dismissed.

Reported by Azra Azman